

No. 12212

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In the United States Court of Appeals  
for the Ninth Circuit

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SHOSO NII, APPELLANT

v.

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUC-  
CESSOR TO THE ALIEN PROPERTY CUSTODIAN,  
APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE TERRITORY OF HAWAII

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APPELLEE'S PETITION FOR REHEARING

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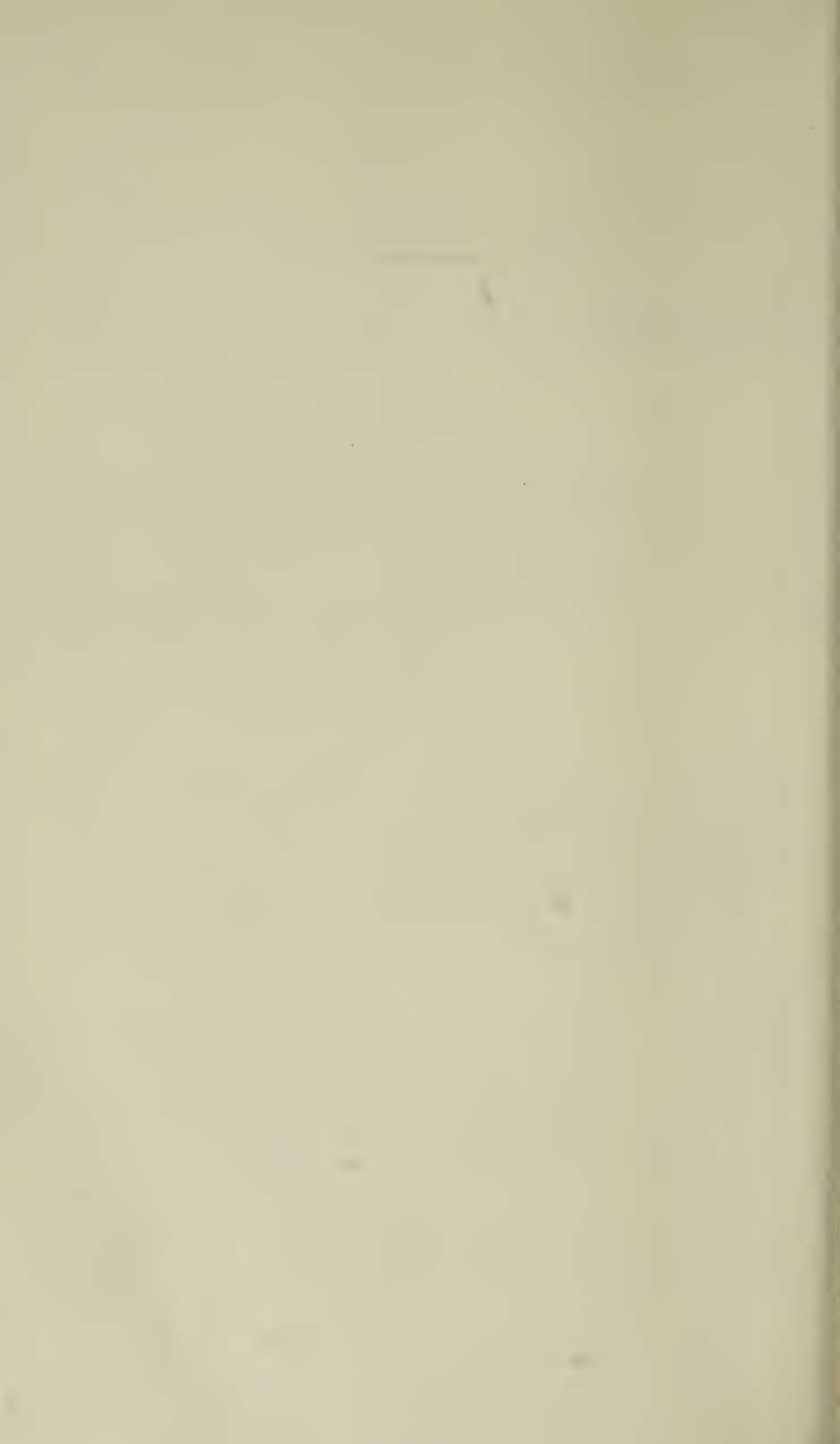
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### **STATEMENT**

On March 6, 1950, this Court reversed that portion of the judgment of the United States District Court for the District of Hawaii which held that Shoso Nii, appellant in this Court, had "no interest, right, or title in the real property within the meaning of Section 9 of the Trading With the Enemy Act" (R. 159).

This Court held that appellant was, at the time of vesting, the equitable owner of the real property in question. In reaching that result the Court found as a fact that appellant's father, the owner of record title at the time of vesting, had promised in 1928 to give appellant "all his property in Hawaii when

the father died or when he permanently left Hawaii, in consideration of the son, already admitted to high school in 1928, giving up his education to work in his father's store" (Opinion, p. 2). Full performance of the conditions was also found as a matter of fact. Despite the fact that the case was decided in the trial court on a different theory, this Court held that the evidence before the trial court was sufficient to support the findings made by this Court. Thereupon, citing Rule 15 (b) of the Federal Rules of Civil Procedure, this Court reversed the judgment below without remanding the case to the trial court for further proceedings.

Pending further briefing, this Court held in abeyance its decision on the question of the right to income from the property earned subsequent to appellant's abandonment of his high school education and his service in his father's store and prior to his father's death. Appellee's supplemental brief on this question is being submitted separately in typewritten form, as requested by the Court.

#### QUESTIONS PRESENTED

1. Whether the theory upon which this Court reversed the judgment of the court below was at issue before the trial court.

2. Assuming a negative answer to the first question, whether appellee has been prejudiced by not having an opportunity to cross-examine, present affirmative evidence, and argue the legal theory on which this Court based its decision.

## ARGUMENT

1. This Court reversed the judgment of the District Court for its alleged improper failure to allow an amendment of appellant's complaint, the stated ground of this Court being that evidence in support of the theory of the amended complaint was admitted without objection by appellee. As authority the Court cited Rule 15 (b) of the Federal Rules of Civil Procedure, which reads as follows:

Rule 15 (b). Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Appellee has no quarrel with the Court's statement of the controlling law. But we submit that its application to this case has been seriously misconceived.

We have no doubt that an important purpose of Rule 15 (b) is to permit the consideration of issues which have been tried with the express or implied consent of the parties as if they had been raised in the pleadings. *Lientz v. Wheeler*, 113 F. 2d 767 (C. A. 8); *Hover v. Genesee Valley Trust Co.*, 123 F. 2d 813 (C. A. 2); 3 *Moore's Federal Practice* (2d Ed.), § 15.13. Even prior to the adoption of Rule 15 (b) this Court had long recognized the general applicability of the principle that where evidence received without objection supports the verdict, defective pleadings will be presumed by an appellate court to have been amended to conform to the proof. *A. Coolot Co. v. L. Kahner & Co.*, 140 Fed. 836 (C. A. 9); *Drilling & Exploration Corp. v. Webster*, 69 F. 2d 416 (C. A. 9); *Hertz Drivurselb Stations v. Ritter*, 91 F. 2d 539 (C. A. 9).

But even as this Court has long recognized the general rule in this connection, it has also enunciated clearly the limitations upon that doctrine. In *Hertz Drivurselb Stations v. Ritter*, *supra*, at page 544, this Court deemed "the complaint amended to conform to the evidence and to the trial court's finding" because "there is nothing to indicate that the appellant was in anywise misled by the defects in appellee's complaint or that on a new trial the evidence would be any different." Thus, the test is seen to be that a complaint may not be treated as amended if it introduces an extrinsic issue or changes the theory on which the case was actually tried to the prejudice of one of the parties. This test has even been applied by this Court to preclude affirmance where the fact

findings of the trial court might have supported a judgment on a theory not pleaded in the lower court. *Sears, Roebuck & Co. v. Marhenke*, 121 F. 2d 598 (C. A. 9). In that case all parties in the trial court, as well as the court itself, treated the action as one based on a theory of negligence. This Court reversed the judgment for plaintiff, refused to consider whether the evidence adduced at the trial would support the judgment below on a theory of implied warranty, and so remanded the case to the trial court for amendment of the complaint and the taking of additional evidence if necessary. The Court held (121 F. 2d, at p. 601):

This is not a case in which issues not raised by the pleadings were tried by the "express or implied consent of the parties" and Rule 15 (b) \* \* \* has therefore no application. The case was tried as one for negligence in accordance with the issues made by the pleadings.

Whether the evidence offered would have supported a judgment for breach of an implied warranty based upon other pleadings and findings we need not now determine. The present action must be treated as one for negligence only.

Other Courts of Appeals have applied similar restrictions to the general principle underlying Rule 15 (b). In *Simms v. Andrews*, 118 F. 2d 803, 807 (C. A. 10) the Court held that Rule 15 (b)

\* \* \* does not authorize such an amendment merely because evidence which is competent and material upon the issues created by

the pleadings incidentally tends to prove another fact not within the issues in the case.

And in *United States v. City of Brookhaven*, 134 F. 2d 442, 446 (C. A. 5) the Court stated that Rule 15 (b)

\* \* \* looks to supporting the judgment by the amendment, or to making the record show more perfectly what was really tried and decided. It does not authorize an amendment to nullify the judgment and begin a new contest.

See also *Champ v. Atkins*, 128 F. 2d 601 (C. A. D. C.); 3 *Moore's Federal Practice* (2d Ed.), § 15.13.

From the foregoing it is clear that the crucial issue in each case is whether decision of a case at the appellate level on a theory of action not presented to the trial court by way of pleadings or evidence, and as to which no findings were made, would prejudice the party who had had no opportunity to respond to that issue.

The above-enunciated rule is only one of many manifestations of the now-familiar judicial maxim that "rules of practice and procedure are devised to promote the ends of justice, not to defeat them." Mr. Justice Black, in *Hormel v. Helvering*, 312 U. S. 552, 557. The broad principles of the scope of appellate review were laid down in the same case (p. 556):

Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they

believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Compare also *United States v. Rio Grande Irrigation Co.*, 184 U. S. 416; *Fountain v. Filson*, 336 U. S. 681. The principle which is common to all these cases and situations is that an appellate court may not reverse summarily the judgment of a trial court where the result would be that:

the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case. [*Fountain v. Filson*, *supra*, at page 683.]

2. The standards of fairness outlined above are particularly pertinent to this case. The pleadings were drawn, the evidence was presented, and the court's findings were made on appellant's theory of a completed gift in 1935. In the trial court any reliance upon the theory of a promise to give and subsequent right to specific performance was explicitly and repeatedly denied by appellant.

There is, of course, no doubt that the original complaint on which the case was tried was insufficient to support this Court's theory of the father's promise to give the property at his death upon consideration of appellant's leaving school and working in his father's store. That complaint merely alleged, in this connection (R. 4):

\* \* \* that in May of 1935 said Kaneichi Nii decided to retire from active business and returned to Japan; that at the time he returned to Japan he left and gave by way of gift everything he left in the Territory of Hawaii to his only son, the plaintiff herein.

Accordingly, appellant must find support for a change in the cause of action either in the proposed amended complaint or in the evidence adduced at the trial. We submit that neither is possible. The proposed amended complaint included additions to the original complaint relevant to this point, as follows (R. 115-116, 119):

\* \* \* that in consideration of plaintiff's giving up his studies said Kaneichi Nii agreed, covenanted and promised that said Kaneichi Nii will give and transfer all of the properties, both real and personal, he owned in the Territory of Hawaii to the plaintiff in case said Kaneichi Nii left for Japan or in case said Kaneichi Nii died all of said Kaneichi Nii's properties will be the plaintiff's; that plaintiff relying on said Kaneichi Nii's aforementioned promise, covenant and agreement did not continue on to high school but discontinued, quit and dropped his schooling completely and in July 1928, began helping said Kaneichi Nii at the said "K. Nii Store." \* \* \*

\* \* \* \* \*

\* \* \* that at the time of Kaneichi Nii's leaving he left by way of gift everything he had whether by way of personal property or real property in the Territory of Hawaii to

the plaintiff; that the foregoing gift was in full execution of the agreement, promise and covenant made by said Kaneichi Nii to the plaintiff in the year 1928 as aforedescribed. \* \* \*

The above quoted language does not support this Court's theory that the property was promised to appellant upon the father's death *subsequent* to departure from Hawaii. The most that could be urged from that wording is that the father promised to give appellant his property upon his death or departure from Hawaii, whichever came earlier. But at the trial appellant denied, as we shall point out *infra*, any reliance on that theory also; and the evidence presented did not support such a theory.

That appellant himself never urged a gift to be effective only at his father's death is shown by the assertion in the proposed amended complaint that the gift was consummated in 1935, alleging (R. 119):

\* \* \* that at the time of Kaneichi Nii's leaving he left by way of gift everything he had \* \* \* in the Territory of Hawaii to the plaintiff. \* \* \*

This, of course, is very different from a gift of property not intended to be effective until the still incalculable date of Kaneichi Nii's death, as this Court held was the case. Moreover, appellant was clearly proceeding on the theory of a gift executed in 1935, and pleaded the 1928 promise only in support

of that theory; there is nothing even in the amended complaint to suggest this Court's theory of a right to specific performance of an unperformed promise to give at an indeterminate future date.

When counsel for appellant offered the proposed amended complaint at the beginning of the trial, he stated in words that could not possibly be misunderstood that he contemplated no change in the cause of action from the original complaint, that he claimed an executed gift, and that he did not intend to rely on a promise of gift. The amendment was originally served on appellee and moved in the trial court immediately prior to the beginning of the trial. Both Judge McLaughlin and Mr. Gross, counsel for appellee, were understandably concerned to know whether this belated amendment raised any new issue as to which appellee had not been fairly apprised in his preparation for trial. In response to queries by the court, Mr. Kashiwa, counsel for appellant, replied (R. 170):

As far as the cause of action, it is not changed at all, your Honor.

A few minutes later Judge McLaughlin asked pointedly and was answered as follows (R. 175):

The COURT. Do you contend that this proposed amendment alters in any way the basic cause of action previously set forth?

Mr. KASHIWA. No, your Honor, it is the same. We contend that it was a gift.

With that assurance Judge McLaughlin properly denied the motion to amend as amounting merely

to pleading evidence (R. 175-176).<sup>1</sup> Accordingly, the trial was allowed to proceed forthwith despite the clear implication that if the trial judge had believed that appellant was raising a new issue, he would have entertained a motion for continuance to allow appellee further time to prepare to meet any new and different theory.

The trial likewise was conducted on the theory of an executed gift effective in May 1935. Indeed, appellant himself in his extensive testimony did not once urge that the property was to be his only upon his father's death. Rather he contended at all times, in answer to questions by the court and by counsel, that his father gave him the property in 1935. For example, when Mr. Kashiwa questioned appellant on this precise subject, the following colloquy occurred (R. 364):

Q. He promised you or he gave?

A. He gave me.

The COURT. Let me have that answer again.

\* \* \* What's the answer?

The WITNESS. He gave me all the property in the Territory.

Questioning by Mr. Gross, counsel for appellee, received a similar response (R. 365):

Q. Mr. Shoso Nii, as of what date do you claim that your father gave you the real estate which is the subject matter of this lawsuit?

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<sup>1</sup> A motion to amend was again denied at the conclusion of the trial, Judge McLaughlin saying, "I can't see anything in your amended complaint which \* \* \* changes the theory of your case one iota," and that he denied the amendment "on the theory that you are neither harmed nor prejudiced by the denial" (R. 397).

A. I can't remember exactly the date, but it was in 1935, just the date before he left for Japan.

It is plain, then, that the pleadings, the oral assurance of appellant's counsel as to the meaning thereof, and the evidence presented at the trial all pointed to the same conclusion, *viz.*, that appellant contended that his father had given him the property in 1935. On that theory it is apparent that appellant's additional testimony in regard to his father's promise in 1928 that he *would* give the property to appellant in the future was introduced merely to indicate in a general way the father's generous inclination toward appellant. From the evidence adduced at the trial it is reasonable to conclude, even assuming *arguendo* a promise made in 1928, that such promise was more than satisfied by the various gifts to appellant made prior to 1935, including a car, the Kaneichi Nii Store, a bank account, shares of stock, etc. There was no attempt at the trial to establish that the alleged promise of 1928 was intended to cover property which was not acquired until some years later. Accordingly, we submit that evidence originally introduced solely for the purpose of demonstrating the father's generous impulses to appellant should not be distorted to serve a different purpose, a purpose which appellant's counsel disclaimed, and which appellant's testimony at the trial clearly showed not to be in accord with his then theory of the facts.

A peculiarly apt illustration of the fact that this issue was not in any way before the trial court is

found in this Court's request for further briefing on the question of income between 1935 and the father's death. Neither party briefed that question below or in this Court because both believed that the question of rights to income depended altogether on the outcome of appellant's plea for relief, as stated in both the original and amended complaints (R. 12, 125-126):

\* \* \* that it be adjudged that the right and title in said real properties are in the plaintiff and that said plaintiff is entitled to the *immediate possession* thereof. \* \* \*  
[Emphasis supplied.]

Thus, if appellant had been sustained in that claim of right to immediate possession on the basis of a gift in 1935, then appellant would have been entitled to retain the rental income. But, when appellant's right to possession and equitable title was denied, the trial court necessarily gave judgment for the appellee as to the rental income. For the same reason, of course, the trial court did not find it necessary to make the findings in regard to income which this Court's different theory necessitates.

From the foregoing we think there can be no doubt that appellee's defense at the trial was predicated upon the reasonable understanding that appellant based his entire case upon a claim of an executed gift made in 1935, and that evidence of an earlier promise by the father was intended merely to establish long-standing donative intent on the part of the father. Similarly, Judge McLaughlin, who denied the credibility of appellant's evidence of a gift in 1935 (R.

156-157), attached no different significance to appellant's testimony in connection with the alleged 1928 promise.<sup>2</sup> It is clear that Judge McLaughlin understood the case to have been tried only on the theory of an oral gift in 1935. In his opinion he said (R. 153):

The facts found, as I have already indicated, do not bring to my mind a conviction that the plaintiff's father made a gift to him of all of his real estate in Hawaii, *as alleged*, in 1935.

The gift allegedly made, *it is argued, was made at the last supper of the family prior to the father's permanent departure for Japan.* [Emphasis supplied.]

The trial judge went on to remark that appellant alleged the 1928 promise "*in an attempt to bolster up his own testimony*" as to the claimed 1935 gift (R. 154; emphasis supplied.) But even assuming that promise to have been made, still Judge McLaughlin was not convinced that the alleged gift of 1935 had been made (R. 154-157). And certainly neither the trial judge, appellant nor appellee evidenced any understanding of a claim of a promise to give which would not be executed until the father's death.

3. In view of the foregoing there can be no mistaking the fact that this Court has decided the appeal on a theory which was not raised in the pleadings, which was denied by appellant's counsel when the

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<sup>2</sup> In his opinion, Judge McLaughlin assumed the promise to have been made, without passing on the question, merely to show that it could make no difference in the outcome of the case on his understanding of the issues tried (R. 154).

question was specifically raised, and was accordingly a theory which was not thought by the court or by either party to be at issue in the trial of the case. Such a change in the controlling legal theory is sufficient by itself to require an appellate court to allow the aggrieved party an opportunity to be heard on the newly raised issues. But in this case there are additional and even more compelling reasons which we believe necessitate a remand of the case to the trial court for the taking of additional evidence bearing on this newly advanced theory.<sup>3</sup>

As we have pointed out, *supra*, pages 4-6, this Court has long followed the salutary rule that the appellate court is free to amend pleadings only to the extent that the issues thereby incorporated were actually tried by the express or implied consent of the parties in the trial court and that neither party was misled in that court by the pleadings. But in this case we have seen that neither the trial court nor the parties believed that there was presented for decision any question of promise of gift upon the father's death. If the trial had been conducted on that theory, appellee's defense would have differed in a number

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<sup>3</sup> As the court pointed out in *Ford Motor Co. v. N. L. R. B.*, 305 U. S. 364, 373:

"It is a familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

Compare *Lincoln Gas & Electric Co. v. Lincoln*, 223 U. S. 349; *Fox v. Gulf Refining Co.*, 295 U. S. 75; *Villa v. Van Schaick*, 299 U. S. 152.

of important particulars from the trial as it actually was conducted.

a. Thus, if it had been believed that appellant's case depended upon a promise claimed to have been made in 1928, his credibility as to that assertion would have been at issue just as it was in connection with the claim of a gift in 1935 which he made at the trial. As to the latter the trial judge found appellant's unsupported testimony not credible. As to the former, no finding was believed necessary because the question was not thought to be at issue.<sup>4</sup> Had it been at issue, there is every reason to believe that Judge McLaughlin would have denied appellant's credibility as to that story as well. The very fact of his disbelief of the claimed 1935 gift suggests that there should be no greater faith in an alleged underlying promise. Insofar as the later claimed gift was said to have been in fulfillment of the earlier claimed promise, it is apparent that the two are interdependent. Disbelief in one strongly suggests disbelief in the other.

b. Furthermore, if the central issue in the trial of this case had been thought to be whether or not there was a promise of gift plus performance of consideration therefor, several additional lines of inquiry would have been necessary. (1) This Court assumed that the father intended after-acquired property to be included in the alleged promise of gift. But the record is silent on that subject, undoubtedly because that promise was alleged only to show donative intent and

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<sup>4</sup> As we have pointed out, Judge McLaughlin merely assumed for purposes of argument that such a promise was made. See note 2, *supra*.

not as the basis for the claim of title. Equally consistent with the limited evidence presented in the trial court is the view that the alleged promise of gift related only to property then owned by the father and that it was fully satisfied by the gift of the car, the store, the bank account, and the stock. (2) There is no indication in the record as to when appellant's performance of the consideration was complete so that equitable title vested in him. Was it in 1928 when he quit school? Was it after he had worked for his father 6 months, 1 year, 5 years, at his father's death, or at some other indeterminate time? (3) Similarly, without knowing the answer to that question it is impossible to determine, in connection with appellant's claim to retain the rental income when, if ever, he might first claim such income. (4) Finally, no evidence was offered at the trial in connection with the important question as to the time for performance contemplated by the alleged 1928 promise. In the trial court all parties apparently assumed that the promise was of a gift to be effective at the father's death or departure from Hawaii, *whichever should be earlier*. Contrary to the understanding of both parties and the court during the trial, this Court has assumed that the effective date of the gift was deferred in the father's discretion until his death.

The decision of this Court does not satisfactorily answer any of these questions; and it is submitted that they can only be inquired into by the trial court. Not until the answers to these underlying questions are known can there be a complete determination of the issue newly posed by this Court. Appellee had

neither occasion nor opportunity in the trial court to cross-examine or present affirmative evidence on any of these questions. They were simply not issues in the case as it was tried. Accordingly, we believe that this Court should withhold judgment in this case and remand for further proceedings in the United States District Court for the District of Hawaii with directions, if desired, to consider the new issue which this Court has raised.

Respectfully submitted.

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CERTIFICATE

I, Robert B. McKay, an attorney for appellee, certify that the foregoing petition for rehearing is in my judgment well founded, and is not interposed for delay.

ROBERT B. MCKAY.

Dated: April 3, 1950, Washington, D. C.